No. 87-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,

Appellants,

v.

SANDRA C. SCHULTZ and ROBERT C. BRAUN,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the trial court exercised permissible discretion by preliminarily enjoining an ordinance banning any and all picketing before or about any residence or dwelling.

2. Whether an ordinance banning any and all picketing before or about any residence or dwelling, including peaceful public issue picketing on public streets, violates the right to freedom of expression under the first amendment.

3. Whether an ordinance banning any and all picketing before or about any residence or dwelling violates the equal protection clause of the fourteenth amendment, when under state law the ordinance does not apply to certain labor picketing.

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Appellees Sandra C. Schultz and Robert C. Braun hereby move this Court, pursuant to Rule 16, to affirm the judgment of the U.S. Court of Appeals for the Seventh Circuit. That court affirmed the judgment of the U.S. District Court for the Eastern District of Wisconsin, which granted plaintiffs-appellees' motion for a preliminary injunction against enforcement of a ban on residential picketing.

SUMMARY OF FACTS

Appellees Schultz and Braun are advocates of the right to life of all human beings, including children conceived but

not yet born. Benjamin M. Victoria, a resident of the Town of Brookfield, Wisconsin, destroys such children at abortion businesses in Milwaukee and Appleton, Wisconsin.

Schultz, Braun, and other individuals picketed on several occasions on the public street outside Victoria's Brookfield residence. The town board of the Town of Brookfield responded by enacting a ban on all residential picketing except for certain labor picketing. Subsequently the town repealed that ordinance and replaced it with a flat ban on all "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., Gen. Code § 9.17(2).

When the picketing ban became effective, Schultz and Braun ceased picketing for fear of arrest and prosecution under the anti-picketing ordinance.

SUMMARY OF PROCEEDINGS

Schultz and Braun, appellees before this Court, brought suit seeking injunctive and declaratory relief. They named as defendants the three members of the town board, the chief of police, the town attorney, and the Town of Brookfield itself, all appellants before this Court.

The U.S. District Court for the Eastern District of Wisconsin granted the motion of appellees Schultz and Braun (hereinafter, "the picketers") for a preliminary injunction, ordering appellants (hereinafter collectively referred to as "the town") not to enforce the Brookfield picketing ban. *Schultz v. Frisby,* 619 F. Supp. 792 (E.D. Wis. 1985).

The town appealed, and a panel of the U.S. Court of Appeals for the Seventh Circuit, by a 2-1 vote, affirmed. *Schultz v. Frisby,* 807 F.2d 1339 (7th Cir. 1986). At the request of the town, the Seventh Circuit subsequently agreed to rehear the case en banc, and vacated the panel decision for this purpose. 818 F.2d 1284 (7th Cir. 1987). Finally, the en banc court affirmed, by an equally divided court and without a published decision, the judgment of the district court. 818 F.2d 33 (7th Cir. 1987).

The town then appealed to this Court.

JURISDICTION

It is not wholly clear that the Court has appellate jurisdiction in the present case. "There is authority, questioned but never put to rest, that [28 U.S.C.] § 1254(2)" — the purported basis for the town's appeal — "is available only when review is sought of a final judgment . . . . The present appeal, however, seeks review of the affirmance of a preliminary injunction." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975) (citations omitted). In the recent case of *Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section,* 106 S. Ct. 2169 (1986), also involving review of a preliminary injunction, the Court directly held that jurisdiction is indeed lacking "where the judgment is not final," at least in a situation "where the case is remanded for further development of the facts," *id.* at 2175-76.

The town does not address the finality question in its jurisdictional statement. The town does assert, however, that the decision of the district court effectively disposed of all relevant issues, Jurisdictional Statement at 35-37, and that "[n]o purpose would be served by the district court conducting a trial to determine whether to grant a permanent injunction," *id.* at 36. Hence this case, while not legally final, nonetheless may fit into the category of "practically final" cases for which this Court has found appellate jurisdiction to exist. *E.g., City of New Orleans v. Dukes,* 427 U.S. 297, 302-03 (1976) (per curiam); *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.,* 357 U.S. 77, 83 (1958).

A finding of "practical" finality in the present case, however, is also fraught with difficulty. The town has already requested a trial on the question of a permanent injunction, and although it may have done so solely to preserve its rights, the potential remains that either the town or the picketers will use the trial option to develop additional facts or legal arguments. Furthermore, the Seventh Circuit's affirmance in the present case by an equally divided court, without opinion, gives little guidance concerning the finality of the case. In *Doran,* it was "less than completely certain that the Court

of Appeals did in fact hold [the ordinance] to be unconstitutional, since it considered the merits only for the purpose of ruling on the propriety of preliminary injunctive relief." 422 U.S. at 927. The present case presents an even less certain case of practical finality than *Doran* because the Seventh Circuit's ruling, while binding upon the parties, did not explicitly address the merits at all.

The Court in the past "has avoided the [jurisdictional] issue by utilizing 28 U.S.C. § 2103 and granting certiorari," *Thornburgh,* 106 S. Ct. at 2175 (and cases cited), and thus resolution of the jurisdictional question is not strictly necessary to the disposition of the present case.

The picketers therefore turn to a consideration of the merits of the case.

STANDARD OF REVIEW

This case involves review of a preliminary injunction. Hence "the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard [for preliminary injunctive relief], constituted an abuse of discretion." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975) (citation omitted) (affirming appeal from affirmance of preliminary injunction).

The "applicable standard" for preliminary injunctions in the Seventh Circuit requires a court to review four factors:

> To obtain a preliminary injunction, a plaintiff must show: (1) that he has no adequate remedy at law or will suffer irreparable harm if the injunction is denied; (2) that the harm he will suffer is greater than the harm the defendant will suffer if the injunction is granted; (3) that the plaintiff has a reasonable likelihood of success on the merits; and (4) that the injunction will not harm the public interest.

ON/TV of Chicago v. Julien, 763 F.2d 839, 842 (7th Cir. 1985) (citation omitted). *Cf. Doran,* 422 U.S. at 931 (noting traditional requirements of irreparable injury and likelihood of prevailing on the merits).

In the case at bar, the town only contests the factor addressing the merits of the case. Hence, the question for this Court is whether the district court abused its discretion in holding that the picketers were likely to prevail in their challenge to the Brookfield picketing ban.

Resolution of this question depends primarily upon legal issues. Therefore this court may — though it need not — engage in a plenary review of the relevant law, *see Thornburgh*, 106 S. Ct. at 2176-77, instead of the cursory review exemplified in *Doran*, 422 U.S. at 932-34.

In the instant case, however, the difference between the deferential *Doran* standard and a more plenary review is of little significance. The question for review is almost purely legal, and hence the same course of analysis applies under either standard. Moreover, the established precedents of this Court clearly support the ruling of the district court; therefore, an affirmance is proper under either standard.

SUMMARY OF ARGUMENT

The Court should summarily affirm the judgment of the court of appeals for the reason that the questions on which the decision of the cause depends are so plainly settled by the prior decisions of this Court as not to need further argument.

The legal focus of this case is the constitutionality of an anti-picketing ordinance in the Town of Brookfield, Wisconsin. The ordinance forbids "any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., Gen. Code § 9.17(2).

As a flat ban on expressive activity in a public forum, the ordinance unconstitutionally deprives the picketers — who wish to picket peacefully on a public street — of their rights under the first amendment. The town rests its defense of the ordinance upon two propositions strikingly at odds with settled constitutional law, and hence plenary consideration of the first amendment question is unwarranted.

The town claims, first of all, that public streets in residen-

tial neighborhoods are not public forum property. Jurisdictional Statement at 11-19. This argument, however, flies in the face of a long and undisturbed line of cases declaring that public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public fora. *See United States v. Grace*, 461 U.S. 171, 177 (1983) (and cases cited); *Carey v. Brown*, 447 U.S. 455, 460-61 (1980) (public streets and sidewalks in residential neighborhoods are public fora).

The town additionally claims that, even if the streets at issue are public fora, picketing is so inherently disruptive of legitimate state interests as to justify a ban on any and all picketing, even the peaceful protest of a solitary picketer. Jurisdictional Statement at 23-29. This argument, however, also contradicts a long line of precedents. This Court has long held that picketing is not intrinsically unlawful; while a state may regulate picketing, it may not totally ban such expressive activity in a public forum. *See Thornhill v. Alabama*, 310 U.S. 88, 105 (1940) (overturning picketing ban); *Carey v. Brown*, 447 U.S. at 469 (peaceful residential picketing could have "but a negligible impact on privacy interests").

Even if this Court were willing to give plenary consideration to the town's jurisprudentially revolutionary first amendment arguments, this case would not be the proper vehicle for doing so. The first amendment question is not properly presented: this case is controlled, on equal protection grounds, by *Carey v. Brown*, 447 U.S. 455 (1980).

In *Carey*, this Court held unconstitutional a ban on residential picketing which allowed for certain residential labor picketing. In Wisconsin, state law sanctions the same kind of residential labor picketing. *See* Wis. Stat. § 103.53(1)(e), (g), (l) (1985-86); *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N.W. 270 (1936) (state law protects labor picketing, during labor dispute, at residence used as place of employment), *aff'd*, 301 U.S. 468 (1937). Consequently, while the Brookfield picketing ban is facially neutral, it must yield to superior state law. Hence the effective reach of the Brookfield ban is indistinguishable, for constitutional purposes, from the statute this Court struck down in *Carey*.

Carey v. Brown obviates the need to address the town's first amendment arguments, arguments which in any case are meritless. This Court should therefore affirm the judgment of the court of appeals without further consideration of this case.

ARGUMENT

The district court in the case at bar correctly determined that the picketers (appellees in this Court) were likely to prevail on the merits of their constitutional challenge to the appellant town's ordinance banning all residential picketing. The court of appeals, in turn, properly affirmed this judgment.

The legal questions the town raises in the present appeal have long been settled by decisions of this Court. The Court should therefore summarily affirm the judgment of the court of appeals, without further briefing or argument.

I. THE BROOKFIELD BAN ON ALL RESIDENTIAL PICKETING, INCLUDING PEACEFUL PUBLIC ISSUE PICKETING ON PUBLIC STREETS, VIOLATES CONSTITUTIONAL FREE SPEECH RIGHTS.

The picketers wish to be free to engage in peaceful, orderly, public issue picketing on a public street in the Town of Brookfield, Wisconsin. Their intended activity receives constitutional protection under the first amendment to the United States Constitution (as incorporated through the fourteenth amendment), and the town has not offered sufficient justification for wholly banning this expressive activity.

Analysis of the picketers' free speech claim proceeds in three steps. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 797 (1985). First, the Court must determine whether the picketers' intended activity represents speech protected under the first amendment. *Id.* Next, the Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic."

Id. Finally, the Court must ascertain whether the asserted justifications for the exclusion of expressive activity satisfy the relevant standard. *Id.*

Application of this analysis to the present case illustrates the permissibility as well as the necessity of a preliminary injunction upholding the picketers' rights.

A. *Peaceful Picketing Constitutes Expressive Activity Under the First Amendment.*

First, the picketers' intended activity plainly constitutes protected expression. "There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (and cases cited).

In particular, "[t]here can be no doubt that . . . peaceful picketing on the public streets and sidewalks in residential neighborhoods . . . [constitutes] expressive conduct that fails within the First Amendment's preserve." *Carey v. Brown*, 447 U.S. 455, 460 (1980) (citations omitted). Moreover, "[p]ublic issue picketing, 'an exercise of . . . basic constitutional rights in their most pristine and classic form,' . . . has always rested on the highest rung of the hierarchy of First Amendment values . . ." *Id.* at 466-67 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)) (additional citations omitted).

B. *Public Streets, Including Public Streets in Residential Neighborhoods, are Quintessential Public Fora.*

Second, the public street on which the picketers wish to picket plainly constitutes a public forum. *Carey*, 447 U.S. at 460-61; *United States v. Grace*, 461 U.S. 171, 177 (1983) (" 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums' ") (and cases cited); *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983) ("At one end of the spectrum [of government properties] are streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions[;]' " such properties are "quintessential public forums") (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)); *Cornelius*, 473 U.S. at 802 (traditional public fora include public streets and parks).

The public forum status of residential streets and sidewalks was a central premise underlying the *Carey* decision. *Perry*, 460 U.S. at 55 (discussing *Carey* and another case) ("the key to those decisions . . . was the presence of a public forum"). In *Carey*, this Court struck down an anti-residential picketing statute under the equal protection clause of the fourteenth amendment because it "discriminate[d] among speech-related activities *in a public forum,*" 447 U.S. at 461 (emphasis added). Had the residential streets and sidewalks in question not been public fora, a very different — and less demanding — standard of scrutiny would have applied. *See, e.g., Cornelius,* 473 U.S. at 806; *Perry,* 460 U.S. at 46.

The town attempts to challenge the public forum status of its residential streets. *See* Jurisdictional Statement at 11-19. In light of the overwhelming Supreme Court precedent to the contrary (which the town acknowledges, *id.* at 18), however, it is unclear from what source the town anticipates conjuring up this major change in established constitutional doctrine. *See Grace*, 461 U.S. at 180:

> the destruction of public forum status . . . is at least presumptively impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expres-

> sion. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.

Absent a revolution in constitutional jurisprudence, then, the picketers' intended activity represents constitutionally protected expressive activity in a public forum. The only remaining question is the sufficiency of the town's asserted justifications for banning the picketers.

C. *The Brookfield Ban on Expressive Activity in a Public Forum is Not Narrowly Tailored to Further a Significant Government Interest.*

The governing standard is well-established. In public fora,

> the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Ass[ociation,* 460 U.S.] at 45. . . . Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

Grace, 461 U.S. at 177.

The Brookfield ban absolutely prohibits all picketing in a public forum, and thus cannot constitute a reasonable time, place, and manner regulation.

The town offers as its motivation and justification its interest in preserving residential privacy and tranquility. Jurisdictional Statement at 21-23.[1] This Court has indicated, without so holding, that these interests might well be considered compelling. *Carey*, 447 U.S. at 464-65, 471. As in *Carey*, however, resolution of this question is unnecessary and irrelevant. These interests are neither appropriate nor adequate bases for prohibiting expression in public fora. Furthermore, the anti-picketing law in question is not narrowly tailored to further the asserted residential interests.

1. Residential peace and privacy interests do not justify bans on expressive activity in public fora outside the private domain.

In the first place, the governmental interests in protecting residential peace and privacy do not extend outward from a given dwelling so as to swallow up all expressive rights in the vicinity. Rather, these interests are focused upon — and limited to — the dwelling itself and, to a lesser extent, the accompanying private grounds. Activity outside this residential locus is subject to government control only to the extent that it invades that locus.

Thus a municipality might prohibit "loud and raucous noises," *see Kovacs v. Cooper*, 336 U.S. 77 (1949) (sound trucks), because the sounds actually invade and disrupt the peace of a dwelling. Similarly, government may restrict ra-

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[1] The town also asserts an interest in public safety. Jurisdictional Statement at 21-22. This interest, however, bears no logical relationship to a ban on all residential picketing. In the first place, there is no evidence to support a conclusion that people who are picketing create any greater hazards than do people who are marching in groups carrying signs — yet the Town concedes the lawfulness of this latter activity, *id.* at 30. Nor is there any evidence to indicate that picketing is any more hazardous than any other pedestrian activities on public streets, such as strolling, jogging, or recreation. Moreover, if picketing actually did increase the risk of car accidents, this risk would be much more serious in the commerical areas of Brookfield, where traffic is both heavier and conducted at higher speeds. Yet the town proposes, and through its ordinance would require, that the picketers take their protest to these more dangerous areas. *Id.* at 31.

dio broadcasts, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (indecent language aired during daytime hours), and delivery of mailed materials, *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) (objectionable mailings), insofar as they involve actual intrusions into the home. Government may, in addition, exercise a more limited regulatory power over door-to-door communicative activities, *see generally Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (discussing cases).

When the communicative activity takes place on public ways outside the dwelling-place, however, residential peace and privacy concerns simply do not supply an adequate justification for government prohibitions. *E.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (peaceful leafletting in residential neighborhood may not be enjoined); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (peaceful, orderly singing and marching through residential neighborhood and around mayor's residence not constitutionally punishable).

The *Rowan* case is illustrative. The issue there was whether the federal government could "make the householder the exclusive and final judge of what will *cross his threshold* . . ." 397 U.S. at 736 (emphasis added). The Court unanimously upheld the governmental power to provide this kind of privacy safeguard, holding that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. The crucial point of the Court's decision was that unwanted mailings are "a form of trespass," *id.* at 737; thus the resident could bar such communication from "entering his home," *id.* The homeowner may "erect a wall" against this intrusion, *id.* at 738, because the "right of a mailer, we repeat, stops at the *outer boundary of every person's domain*," *id.* (emphasis added).

In the *Keefe* case, by contrast, an eight-member majority of the Court (seven of whom joined in the *Rowan* decision) summarily rejected residential privacy as a justification for banning peaceful residential leafletting.

> Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record. *Rowan* . . ., relied on by the respondent, is not in point; *the right of privacy involved in that case is not shown here.* Among other important distinctions, respondent is not attempting to stop the flow of information *into his household*, but to the public.

402 U.S. at 419-20 (emphasis added).

The interest of the Town of Brookfield in protecting peace and privacy in the home, then, is simply inapposite to the present case. The town may, of course, regulate conduct which actually intrudes upon the residential domain. In fact, the town already has ordinances prohibiting: trespass to land and dwellings, making loud and unnecessary noises disruptive of private residences, destroying private property, and littering on private property. Town of Brookfield, Wis., Gen. Code, §§ 9.943.13, 9.943,14, 9.06, 9.09, 9.10. *See* Addendum.

The town does not, however, have license to ban peaceful, orderly picketing in public areas under the guise of protecting residential peace and privacy. The true goal of the Brookfield ban — to prevent "embarrassment and intimidation" of the picketed resident — simply does not supply a legitimate justification for a ban on speech. "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). As the Supreme Court explained in the *Keefe* case,

> The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners [the leafletters] plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive

> to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

402 U.S. at 419.

2. The Brookfield ban is not narrowly tailored to advance the asserted interests.

Aside from the constitutional impropriety of extending residential peace and privacy concerns beyond their proper domain and into public fora, there is a second fatal deficiency in the proffered justifications of the Brookfield ban: the ordinance is not narrowly tailored to further those interests.

Under the constitutional standards relevant to regulation of expressive conduct in a public forum, reasonable time, place, and manner regulations must be "narrowly tailored" to serve the relevant government interests, and flat bans on a given type of expression must be "narrowly drawn" to further a compelling interest. *United States v. Grace*, 461 U.S. 171, 177 (1983).

These requirements of narrow regulation reflect the principle that in the area of first amendment rights, the state may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (and cases cited). Constitutional rights would be meaningless if the state could sweep them away in the wake of broad laws. The Constitution, therefore, requires government to act with sensitivity to these rights and to allow their full exercise except where their restriction is essential to further an interest of sufficient weight.

a. The Brookfield ban does not limit itself to regulating abuses, but instead broadly proscribes expressive activity.

The Brookfield ban demonstrates no such sensitivity to

constitutional rights. The anti-picketing ordinance completely bans any and all residential picketing, instead of confining itself to abusive conduct.

The town claims the ban is necessary to protect residential safety and privacy. But the ordinance does not prohibit only violent, unsafe, or disorderly behavior. Instead, the Brookfield ban outlaws all picketing, the peaceful and orderly as well as the disruptive and abusive. This flat ban is a classic example of unconstitutional overbreadth, *see infra* § I(D), and plainly violates the "narrowly tailored" requirement.

The Brookfield ban makes no distinctions and allows for no exceptions in its broad prohibitory application. While content-based exceptions are, of course, inimical to equal protection, *see infra* § II, content-neutral specifications are essential to the narrowing of an otherwise overbroad law. The Brookfield ban, however, makes no effort to distinguish between peaceful picketing and disorderly picketing, between picketing in small numbers or in crowds, between picketing on public streets and sidewalks or on private property, between picketing for a short time or at all hours of the day and night, between picketing on less-traveled roads or on busy thoroughfares. Each of these features bears heavily upon the government interests in safety and privacy. Yet the flat ban the town enacted gives not the slightest heed to any such factors. While laws need not attain microscopic precision, the Brookfield ban presents the opposite extreme of complete insensitivity to the rights and interests at stake.

b. Picketing is not inherently proscribable.

The town apparently recognizes the radical nature of its ordinance, and thus to defend the ordinance the town takes a radical legal position: *all* picketing is *inherently* so disruptive of residential well-being and privacy that a flat ban is justified. *See* Jurisdictional Statement at 25-29.

The town's position, however, calls for a major departure from established constitutional jurisprudence. As long ago as 1940, this Court refused to consider picketing per se to

be a breach of lawfulness sufficient to justify its prohibition.

> [N]o clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter.

Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (overturning picketing ban). Subsequent cases have reaffirmed this principle in such varied setting as outside a home, *Carey v. Brown*, 447 U.S. at 469 ("Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests") (footnote omitted), a school, *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) ("it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians") (footnote omitted), and a courthouse, *Grace*, 461 U.S. at 182 ("A total ban on [picketing and other communicative activity] is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the [Supreme Court] building than on any other sidewalks in the city").

Since the Brookfield flat ban is not narrowly tailored to further significant government interests, it fails the test for reasonable time, place, and manner regulations of expressive activity. Since the town's defense of its anti-picketing ordinance rests upon a call for major revisions in constitutional law, the trial court properly found the picketers to have a reasonable likelihood of success on the merits of their challenge to the ordinance.

D. *The Brookfield Ban On All Residential Picketing is an Unconstitutionally Overbroad Prohibition of Free Expression.*

The flat ban Brookfield enacted against residential picketing suffers from fatal overbreadth, and thus is unconstitutional on its face.

1. In the context of first amendment rights, litigants may challenge a restriction on grounds of overbreadth.

In the area of first amendment rights, litigants may "challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984).

In the present case, the picketers challenge an ordinance that bans picketing, a classic form of free expression. *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972). The case therefore provides an appropriate vehicle for a facial overbreadth challenge to the ordinance. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19 (1984) ("[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack").

2. The Brookfield anti-picketing ordinance restricts expressive activity in an unconstitutionally overbroad manner.

The Brookfield ban on all residential picketing is unconstitutionally overbroad because it "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). The Brookfield ban makes picketing itself the object of its legal animosity, instead of addressing abusive behavior that may or may not be associated with picketing. The proper constitutional principles are clear:

> The people through their Legislatures may protect

> themselves against th[e] abuse [of rights to free speech and assembly]. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

De Jonge v. State of Oregon, 299 U.S. 353, 364 (1931).

As discussed above, the Brookfield ban does not distinguish among the varying situations in which picketing may take place, or limit the ban to picketing of a disruptive or otherwise unlawful nature. The ban sweepingly prohibits all picketing, ignoring the number of picketers, the time and duration of the picket, the orderliness of the picketers, the nature of the vicinity (other than the unspecified proximity of at least one "residence or dwelling"), and the public or non-public character of the specific site used.

Gregory v. City of Chicago, 394 U.S. 111 (1969), illustrates the patent invalidity of the Brookfield ban. In *Gregory*, former Chief Justice Warren proclaimed that the facts presented "a simple case," 394 U.S. at 111, since the protesters' march from city hall to the mayor's residence, where they continued to demonstrate, "falls well within the sphere of conduct protected by the First Amendment," *id.* at 112.[2]

The *Gregory* case fits into an established first amendment jurisprudence that rejects sweeping and conclusory prohibitions on expressive activity in public fora, and that tolerates only laws which address specific unlawful aspects of the behavior in question. *See Lovell v. Griffin*, 303 U.S. 444 (1938) (overturning blanket, wholly discretionary permit requirement for literature distribution); *Hague v. CIO*, 307 U.S. 496 (1939) (overturning effectively discretionary permit requirement for public assemblies in public streets, parks, and public

[2] The facts in *Gregory* were as follows: 85 protestors marched to the mayor's home, arriving at about 8 p.m. They chanted and sang while marching around the block, using streets and sidewalks. At 8:30 p.m. the demonstrators stopped singing and chanting, and marched silently until their arrest and dispersion by police at 9:30 p.m. *See* 394 U.S. at 126-30 (Appendix to opinion of Black, Jr., concurring).

buildings; overturning ban on distribution of handbills and placards); *Schneider v. State*, 308 U.S. 147 (1939) (overturning flat bans on literature distribution on streets and sidewalks; overturning blanket, wholly discretionary licensing requirement for door-to-door canvassing, solicitation, and literature distribution); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (overturning flat ban on loitering or picketing at a place of business); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (overturning breach of peace convictions for peaceful demonstration on statehouse grounds); *Cox v. Louisiana (Cox I)*, 379 U.S. 536 (1965) (overturning breach of peace conviction for peaceful march to and demonstration at courthouse; overturning ban on obstruction of public passages where enforcement left to unbridled discretion of authorities); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (overturning disorderly conduct convictions for peaceful march to and demonstration around residential block); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (overturning blanket, wholly discretionary permit requirement for parades and demonstrations); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (overturning blanket injunction against residential leafletting); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (overturning flat ban on charitable solicitation, door-to-door or on public ways, by organizations that do not use at least 75% of receipts for charitable purposes); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (overturning civil liability imposed for nonviolent political boycott and associated speeches and nonviolent picketing); *United States v. Grace*, 461 U.S. 171 (1983) (overturning flat ban on picketing and leafletting as applied to public sidewalks outside Supreme Court Building).

By sheer force of repetition, this long line of decisions firmly establishes the impropriety of "broad prophylactic rules," and the requirement that regulations address only specific, harmful aspects of expressive behavior.

Thus, as a ban on all residential picketing, including peaceful picketing in a public forum, the Brookfield ordinance is patently unconstitutional. *Accord Pursley v. City of Fayetteville, Arkansas*, 820 F.2d 951 (8th Cir. 1987), *reh'g and reh'g*

en banc denied, No. 86-1332 WA (8th Cir. Aug. 28, 1987); *State v. Schuller*, 280 Md. 305, 372 A. 2d 1076 (1977); *State v. Anonyomus*, 6 Conn. Cir. 372, 274 A.2d 897 (1971); *Flores v. City and County of Denver*, 122 Colo. 71, 220 P.2d 373 (1950) (en banc); *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing*, 433 Pa. 578, 252 A.2d 622 (1969).

The relevant precedent plainly indicates that the picketers had a reasonable likelihood of succeeding on the merits of their overbreadth challenge to the flat ban at issue here. Issuance of a preliminary injunction against enforcement of this ban was therefore proper.

E. *The Decision of the Tenth Circuit in Garcia v. Gray Does Not Necessitate Plenary Consideration of the Present Case.*

The town cites *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975), as a contrary authority creating a conflict among the federal courts of appeals. *Garcia* sustained against constitutional challenge a flat ban on residential picketing.

Garcia, however, is an isolated and aberrant decision properly limted to its particular facts. The case is highly suspect as a precedent, even in its own federal circuit, and thus by no means requires this Court to engage in full plenary consideration of the case at bar.

1. *Garcia* is properly limited to its own facts.

The *Garcia* case emerged from a fact pattern rather antithetical to the ideal of peaceful picketing. *See, e.g.* 507 F.2d at 541 ("300 'picketers' . . . on the sidewalk and lawn, . . . a large number of cars . . . racing their motors with sliding wheels, coupled with many honking horns and noisy car occupants"). Hence the case is properly limited to its particular facts. *See* 507 F.2d at 545 ("ordinance forbidding residential picketing does, *from the facts contained in the whole of this record*, constitute a valid exercise of governmental power . . ."') (emphasis added).

2. *Garcia* employs plainly improper legal analysis.

The *Garcia* court failed to engage in proper first amendment forum analysis, and consequently mistakenly treated public streets and sidewalks as equivalent to private property for free speech purposes. *See* 507 F.2d at 541, 543. The court considered the forum in question to be "in this case residential structures occupied by the appellees and their families," *id.* at 543. As discussed *supra* § I(C)(1), however, the peace and privacy interests relevant to protection of the home do not necessarily apply outside the home — for example, in a public forum.

The *Garcia* court characterized picketing as a "nuisance" inherently proscribably, 507 F.2d at 544. While this legal conclusion may be a result of the unattractive record in *Garcia*, the conclusion nonetheless runs contrary to established first amendment jurisprudence. *See supra* § I(C)(2)(b).

Perhaps most glaring and indefensible, however, is the *Garcia* court's misuse of citations in supporting its divergence from constitutional jurisprudence. The court states, *id.* at 544-45, that in general the privacy right of the home prevails over the picketer's expressive rights. This statement mischaracterizes the issue, since it blurs the distinction between a public forum and the private domain. This statement also misstates the law, as examination of the supporting string citation reveals.

The *Garcia* court cites the *Gregory* case, in which the protestors' rights prevailed. The court further cites *State v. Anonymous*, 6 Conn. Cir. 372, 274 A.2d 897 (1971), which upheld the right to engage in residential picketing. The court even cites *Keefe v. Organization for a Better Austin*, 115 Ill. App. 2d 236, 253 N.E.2d 76 (1969), listing it as "rev'd on other grounds" in the Supreme Court. In *Keefe*, however, this Court explicitly rejected privacy rights as justifying prohibitions on expressive conduct in public fora. *Keefe*, 402 U.S. 415, 419-20 (1971). Beyond these contrary authorities, the *Gar-*

cia court cites several labor cases,[3] an American Law Reports annotation, and a solitary supporting state court decision, *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1971).

3. *Garcia* is no longer valid authority in the Tenth Circuit.

There is little reason to believe that the *Garcia* decision remains a valid precedent, even in the Tenth Circuit, where it originated. Appellees' research reveals no subsequent federal decision in the Tenth Circuit that has relied upon or even cited *Garcia* with respect to its first amendment analysis. Moreover, recent decisions of the Tenth Circuit indicate that that court of appeals now recognizes — in implicit repudiation of *Garcia* — both the need to apply proper forum analysis, *e.g., Bell v. Little Axe Independent School District No. 70 of Cleveland County*, 766 F.2d 1391, 1400-02 (10th Cir. 1985) (access to public school facilities), and the need to examine restrictions on first amendment activity for the requisite "narrow specificity," *ACORN v. Municipality of Golden, Colorado*, 744 F.2d 739, 746 (10th Cir. 1984) (door-to-door canvassing). In light of these and other intervening decisions in the Tenth Circuit, as well as a multiplicity of decisions both in other circuits and in this Court, *Garcia* is no longer good law.

Garcia, then, offers scant assistance to the town in the present case. Its unique facts, patently erroneous legal analysis, and suspect precedential status in its own circuit render it a decision without authority. *Garcia* does not create a conflict among the circuits of sufficient substance to justify more than a summary disposition of the present case.

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[3] Two of these five labor cases predate the 1940 *Thornhill* decision recognizing constitutional protection for picketing, all were decided in or before 1947, and only one was a Supreme Court decision. That case, *Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), dealt with unfair labor practices, and explicitly declined to address the constitutional questions at issue here. 315 U.S. at 751.

II. THE BROOKFIELD BAN ON RESIDENTIAL PICKETING VIOLATES EQUAL PROTECTION WHEN, UNDER STATE LAW, THE ORDINANCE DOES NOT APPLY TO CERTAIN LABOR PICKETING.

In addition to its unconstitutionality as a violation of free speech rights, the Brookfield ban denies the picketers equal protection of the laws in contravention of the fourteenth amendment to the United States Constitution. While the district court did not accept this argument (and the court of appeals, issuing no opinion, did not address it), the equal protection rationale provides a straightforward alternative ground for upholding the trial court's ruling that the picketers had a reasonable likelihood of success on the merits of their claim.

A. *Despite Its Absolute Terms, the Brookfield Ban Cannot Apply to Certain Labor Picketing Authorized Under State Law.*

The Brookfield ban appears on its face to be content neutral and completely without exception in its application. As a municipal ordinance, however, the anti-picketing law is subject to higher legal authority, such as state and federal statutory law. In particular, the picketing ban must yield to specific state authorization of certain labor picketing.

Wisconsin statutory law provides as follows:

> 103.53 Lawful conduct in labor disputes.
>
> (1) The following acts, whether performed singly or in concert, shall be legal:
>
> * * *
>
> (e) Giving publicity to and obtaining or communicating information regarding the exis-

tence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

* * *

(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

* * *

(l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.

Wis. Stat. § 103.53(1)(e), (g), (l) (1985-86). The Supreme Court of Wisconsin has applied this statutory approval of labor picketing in the context of the labor picketing of a residence used as a place of business. *See Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N.W. 270 (1936), *aff'd*, 301 U.S. 468 (1937).

Because the flat ban contained in the Brookfield ordinance conflicts with this state statute, the ordinance is invalid to the extent of the conflict.[4] *Volunteers of America v. Village of Brown Deer*, 97 Wis. 2d 619, 622, 294 N.W.2d 44, 46 (Ct. App. 1980); *accord Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources*, 85 Wis. 2d 518, 529, 271 N.W. 2d 69, 74 (1978). In other words, the state-wide

[4] While the relevant Wisconsin labor statute precludes a ban on protected labor picketing, it would not necessarily conflict with — and hence preempt — reasonable time, place, or manner restrictions. Thus, the equal protection problems resulting from the present conflict between state and local law need not plague all local efforts to regulate picketing.

authorization of labor picketing takes precedence over the prohibitory local ordinance; consequently, the Brookfield ordinance, by operation of law, must exempt at least the peaceful picketing of a place of business involved in a labor dispute.

B. *The Differing Treatment of Labor and Nonlabor Picketing Constitutes Invidious Discrimination Against Protected Expression.*

In *Carey v. Brown*, 447 U.S. 455 (1980), this Court invalidated a statute which prohibited residential picketing in most instances, but which did not ban the peaceful picketing of a place of employment involved in a labor dispute. *See id.* at 457. The Court noted that "peaceful picketing on the public streets and sidewalks in residential neighborhoods [constitutes] expressive conduct that falls within the First Amendment's preserve." *Id.* at 460 (citations omitted). The Illinois regulatory scheme, by "exempting from its general prohibition only the 'peaceful picketing of a place of employment involved in a labor dispute,' . . . discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication." *Id.* (footnote omitted). Such content-based discrimination violated the Equal Protection Clause, the Court held, since the legislation was not "finely tailored to serve substantial state interests." *Id.* at 461-62. Neither the interest in residential privacy, *id.* at 464-65, nor the interest in special protection for labor protests, *id.* at 466-67, nor any combination of these, *id.* at 467-69, sufficed to justify such discriminatory regulation of picketing; thus, the Illinois anti-picketing statute was unconstitutional.

That the labor exception to the Brookfield picketing ban arises outside the terms of the ordinance has no constitutional significance. The effective reach of the law is identical, for equal protection purposes, to that of the unconstitutional Il-

linois statute.[5] Hence *Carey* controls this case, and the Brookfield ban is plainly unconstitutional.

Since the Brookfield ban in its effective operation denies the picketers the equal protection of the law, the picketers are reasonably likely to succeed on the merits or their challenge, and the preliminary injunction was appropriate.

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[5] If Illinois had enacted the labor exception as a separate statute (e.g., "Any provision to the contrary notwithstanding, peaceful picketing during a labor dispute shall be legal"), a facially complete ban on residential picketing would still be unconstitutionally discriminatory under *Carey*. The ban would be unconstitutional, regardless of whether the prohibitory law contained an explicit labor exception, because the independently existing authorization of labor picketing would effectively limit the application of the picketing ban to nonlabor picketing. Otherwise a state could circumvent and frustrate the *Carey* rule by the merely formal device of enacting the unconstitutional law in two distinct pieces.

CONCLUSION

The district court exercised permissible discretion when it issued a preliminary injunction against the Brookfield flat ban on residential picketing. The picketers clearly satisfied the criteria for the issuance of a preliminary injunction, and in particular demonstrated far more than the necessary reasonable likelihood of success on the merits of their claim. The court of appeals therefore properly affirmed the district court. This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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ADDENDUM: Selected Ordinances of the Town of Brookfield, Wis.

9.05 *OBSTRUCTING STREETS AND SIDEWALKS PROHIBITED.* No person shall stand, sit, loaf, loiter or engage in any sport or exercise on any public street, sidewalk, bridge or public ground within the Town in such manner as to prevent or obstruct the free passage of pedestrian or vehicular traffic thereon or to prevent or hinder free ingress or egress to or from any place of business or amusement, church, public hall or meeting place, except with the permission of the Town Board upon written application to the Board.

9.06 *LOUD AND UNNECESSARY NOISE PROHIBITED.* No person shall make or cause to be made any loud, disturbing or unnecessary sounds or noises such as may tend to annoy or disturb another in or about any public street, alley, park or any private residence.

9.08 *LOITERING PROHIBITED.* (1) LOITERING OR PROWLING. No person shall loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the person takes flight upon appearance of a police or peace officer, refuses to identify himself or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstances makes it impracticable, a police or peace officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this subsection if the police or peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the person was true and, if believed by the police or peace officer at the time, would have dispelled the alarm.

(2) OBSTRUCTION OF HIGHWAY BY LOITERING. No person shall obstruct any street, birdge, sidewalk or crossing by lounging or loitering in or upon the same after being requested to move on by any police officer.

(3) OBSTRUCTION OF TRAFFIC BY LOITERING. No person shall loaf or loiter in groups or crowds upon the public streets, alleys, sidewalks, street crossing or bridges, or in any other public places within the Town, in such manner as to prevent, interfere with or obstruct the ordinary free use of the public streets, sidewalks, street crossings and bridges or other public places by persons passing along and over the same.

(4) LOITERING AFTER BEING REQUESTED TO MOVE. No person shall loaf or loiter in groups or crowds upon the public streets, sidewalks or adjacent doorways or entrances, street crossings or bridges or in any other public place or on any private premises without invitation from the owner or occupant, after being requested to move by any police officer or by any person in authority at such places.

9.09 *DESTRUCTION OF PROPERTY PROHIBITED.* No person shall willfully injure or intentionally deface, destroy or unlawfully remove, take or meddle with any property of any kind or nature belonging to the Town or its departments, or to any private person without the consent of the owner or proper authority.

9.10 *LITTERING PROHIBITED.* No person shall throw any glass, garbage, rubbish, waste, slop, dirty water or noxious liquid, or other litter or unwholesome substance upon the streets, alleys, highways, public parks or other property of the Town or upon any private property not owned by him or upon the surface of any body of water within the Town.

9.29.288 to 9.948.16 *OFFENSES AGAINST STATE LAW SUBJECT TO FORFEITURE.* The following statutes

following the prefix "9" defining offenses against the peace and good order of the State are adopted by reference to define offenses against the peace and good order of the Town, provided the penalty for commission of such offenses hereunder shall be limited to a forfeiture imposed under § 25.04 of this Code.

9.943.13	Criminal Trespass to Land
9.943.14	Criminal Trespass to Dwelling
9.947.01	Disorderly Conduct